FILE COPY

FILED
FEB 2
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner.

vs.

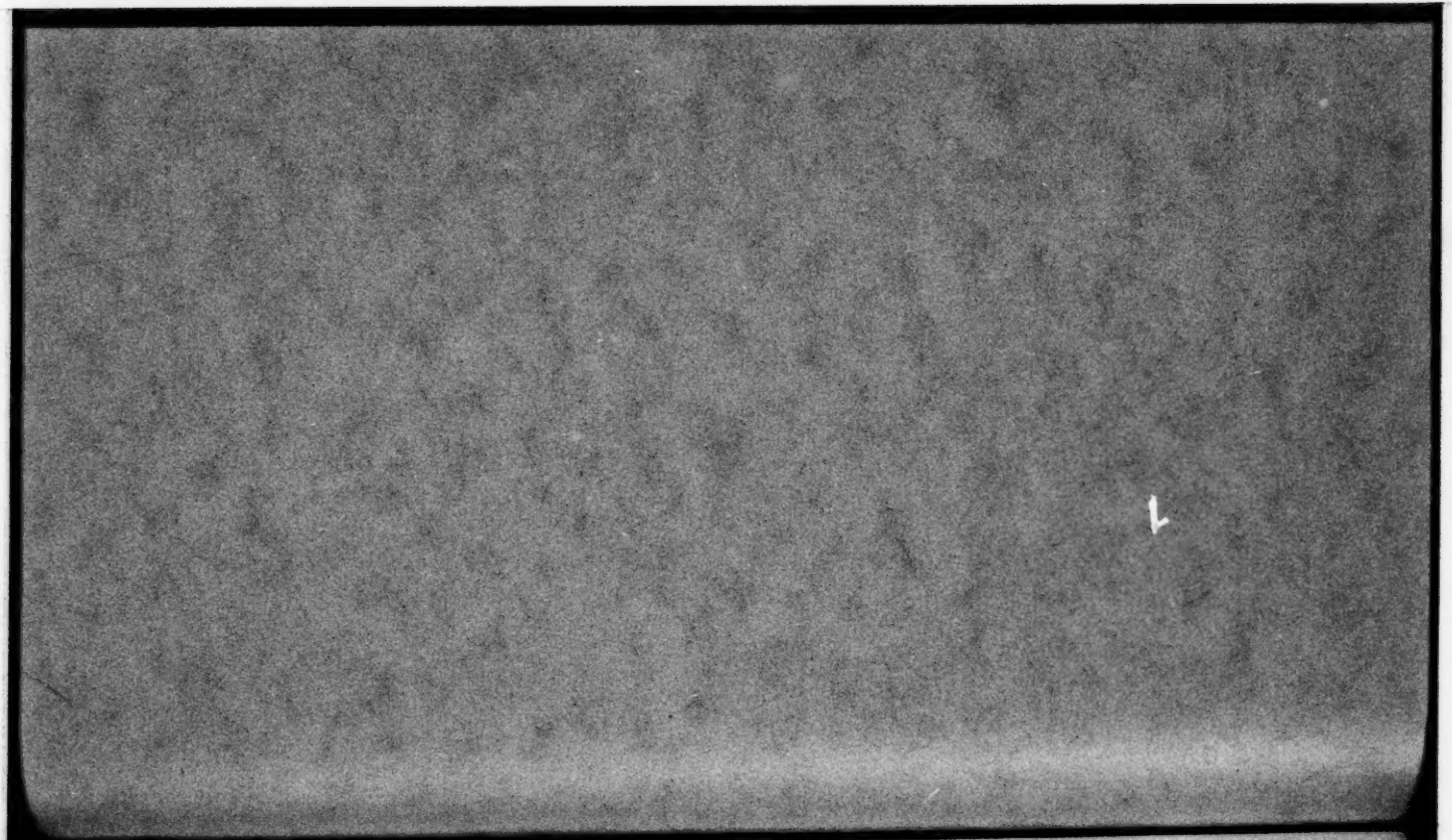
NICK MIHAS,
Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

JOHN P BRAMHALL, JOSEPH D. RYAN,
Counsel for Respondent.
Of Counsel.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

(33,928)



SUBJECT INDEX.

	PAGE
Jurisdiction of the court	1
Statement of facts	8
Negligence established by the record	8
Assumed risk not subject to review here	13
Rulings of trial and Appellate Courts free from manifest error	16
Respondent did not assume the risk of petitioner's unusual conduct	15
Authorities cited by petitioner not in point	18
Appendix	20

TABLE OF CASES AND AUTHORITIES CITED.

	PAGE
Gregory v. McVeigh, 23 Wall. 294	2
Stratton v. Stratton, 239 U. S. 55	2
McMaster, et al. v. Gould, et al., 72 L. ed. (U. S. Sup. Ct. Advance Opinions, March 15, 1928), p. 337	3
Matthews v. Huwe, 269 U. S. 262	3
Fisher v. Perkins, 122 U. S. 522	3
U. S. v. Carver, 260 U. S. 482	4
Wilcox v. Bird, 330 Ill. 571-575	4
Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 208	4
McKee v. Trisler, 311 Ill. 537, 538	4
Rubin v. Strandberg, 288 Ill. 64, 65	4
G. W. Oil Co. v. C. M. & St. P. Ry. Co., 275 Ill. 56, 57	5
Sherwin v. City of Aurora, 257 Ill. 458	5
McAllister & Schroeder v. Weber Motor Car Co., 243 Ill. App. 530	5
Butters v. C. B. & Q. R. Co., 154 Ill. App. 275	5
Voges v. Davison, 306 Ill. 357	5

Ditch v. Sennott, 116 Ill. 288 5
Hartford Life Insurance Co. v. Johnson, 249 U. S. 492, 493 6
Olympia Mining Co. v. Kerns, 236 U. S. 211 7
Chesapeake & O. Ry. Co. v. McDonald, 214 U. S. 191 7
Mellon v. O'Neil, 275 U. S. 212 7
Atlantic Coast Line R. R. Co. v. Mims, 242 U. S. 532, 536 6
Ill. Cent. R. R. Co. v. Skaggs, 240 U. S. 66, 69 10
Myers v. Pittsburgh Coal Co., 233 U. S. 184 12
Dunlap v. NorthWestern Ry. Co., 130 U. S. 649, 32 L. ed. 1058, 9 S. C. 647 13
Louisville & N. Ry. Co. v. Woodson, 134 U. S. 614, 33 L. ed. 1032, 10 S. C. 628 13
Washington & Georgetown Ry. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 S. C. 1044 13
Keyes v. Kimmel, 186 Ill. 109 14
Duggan v. Ryan, 211 Ill. 133 14
Pollock v. Pollock, 328 Ill. 179 14
Jones v. Veeck, 197 Ill. App. 119, 120 14
Rosenfeld v. Ehrhart, 202 Ill. App. 617, 618 14
Richmond & D. R. Co. v. Powers, 149 U. S. 43, 37 L. ed. 642, 13 S. C. 748 16
Patton v. Texas & Pac. Ry. Co., 179 U. S. 658, 45 L. ed. 361, 21 S. C. 275 16
Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169 17
Great Northern Ry. Co. v. Knapp, 240 U. S. 464 18
Erie R. R. Co. v. Welsh, 242 U. S. 303 18
Seaboard Air Line v. Padgett, 236 U. S. 668 18
Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 468 15
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 68, 48 L. Ed. 96 15
Seaboard Air Line v. Horton, 233 U. S. 492, 502 ... 15
Chesapeake & Ohio Ry. Co. v. DeAtley, 241 U. S. 310 15
Director General of Railroads v. Templin, 268 Fed. 483, 486 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner.

vs.

NICK MIHAS,

Respondent.

Respondent's Reply to Petition for Writ of Certiorari.

I.

JURISDICTION OF THIS COURT.

This petition for writ of certiorari should be dismissed for want of jurisdiction.

(A) While a petition for writ of certiorari was filed in the Supreme Court of Illinois by petitioner which was denied (Rec. 226), the record in this case discloses that no certificate of importance was asked for or denied in the Appellate Court of Illinois. Had petitioner asked for a certificate of importance and had the Appellate Court of Illinois granted such certificate, the case could have been taken, as a matter of right, to the Supreme Court of Illinois, the highest court of the State, and that court would have been required to take the case, review it, and pass judgment upon it.

The Statute of Illinois (Sec. 121, Chapter 110 Cahill's Revised Statutes of Illinois, 1927) provides that in case a majority of the judges of the Appellate Court, in a case decided by them, involves a question of such importance that it should be passed on by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal (Appendix p. 20).

It appears from the foregoing that petitioner did not, in accordance with the United States statutes (See Judicial Code), exhaust all the remedies at hand for obtaining "a final judgment or decree * * * in the highest Court * * * in which a decision in the suit could be had * * *."

Petitioner having failed to ask for a certificate of importance in the Appellate Court of Illinois, the granting of which would have required the Supreme Court of Illinois to take the case and consider the errors assigned —if any were assigned—in the Appellate Court, it becomes apparent that petitioner failed to comply with the United States statutes and did not exhaust in the State Court the means at hand for obtaining a final judgment in the highest court of the State and this court is, therefore, without jurisdiction to entertain this petition.

Gregory v. *McVeigh*, 23 Wall. 294.
Stratton v. *Stratton*, 239 U. S. 55.

The denial of petitioner's petition for writ of certiorari by the highest court of the State of Illinois is not such a judgment of such court as may be reviewed by the Supreme Court of the United States by writ of certiorari,

since petitioner failed to make application to the Appellate Court for a certificate of importance which, if granted, entitled petitioner to an appeal to the Supreme Court of Illinois "as a matter of right."

McMaster, et al. v. *Gould, et al.*, 72 L. ed. (U. S. Sup. Ct. Advance Opinions, Mar. 15, 1928), p. 337.

Matthews v. *Huwe*, 269 U. S. 262,

Fisher v. *Perkins*, 122 U. S. 522.

It will be observed that in the *McMaster* case, 72 L. ed., p. 337, *supra*, under the New York Practice Act, an appeal to the Court of Appeals, which does not lie as a matter of right, may be taken where the Appellate Court certifies that a question of law is involved which ought to be reviewed, or where, in case of its refusal so to certify, an appeal is allowed by the Court of Appeals. When an appeal, which is not a matter of right, is taken without leave, it must be dismissed, notwithstanding that leave to appeal in the first instance is discretionary with both courts.

The fact that under the Illinois practice, petitioner had the right to and did apply for a writ of certiorari to the Supreme Court of Illinois without applying for a certificate of importance in the Appellate Court does not alter the situation, since the refusal of the Supreme Court to grant such writ was discretionary with that court. This is conceded by petitioner (Petition, page 4). While the limit of time for making application in this court for petition for certiorari runs from the date when certiorari was denied by the Supreme Court of Illinois (*American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 20), nevertheless that court never took the case for review or determination or passed upon its merits.

Obviously petitioner, in the instant case, did not exhaust all the remedies or means at hand for obtaining a final judgment or decree by the highest court of the State of Illinois. No final judgment or decree has been entered in the Supreme Court of Illinois, and the petitioner's application for a writ of certiorari to this (United States Supreme Court) if granted, must be directed to the Appellate Court of Illinois (also conceded by petitioner—Petition, p. 4), which court had before it the entire record of proceedings and wherein the final judgment or decree in this case was entered.

The effect of the denial of a petition for writ of certiorari has often been declared by the Supreme Court of the United States.

In the case of *U. S.* v. *Carver*, 260 U. S. 482, it is said:

> "The denial of a writ of certiorari imports no expression of opinion on the merits of the case."

We submit that the ruling in the *McMaster* case, *supra*, is decisive of this case, as no final judgment or decree "was ever entered in the highest court" of the State of Illinois. Such judgment might have been obtained if petitioner had applied for and been granted a certificate of importance in the Appellate Court of Illinois.

The Appellate Courts of Illinois frequently grant certificates of importance upon application therefor.

Wilcox v. *Bird*, 330 Ill. 571-575.

Reivitz v. *Chicago Rapid Transit Co.*, 327 Ill. 207, 208.

McKee v. *Trisler*, 311 Ill. 537, 538.

Rubin v. *Strandberg*, 288 Ill. 64, 65.

G. W. Oil Co. v. *C. M. & St. P. Ry. Co.*, 275 Ill. 56, 57.

Sherwin v. *City of Aurora*, 257 Ill. 458.

(B) The record fails to disclose any assignment of errors in the Appellate Court of Illinois.

The Appellate Court of Illinois, by its judgment affirmed the judgment of the trial court, and it is to said Appellate Court that the writ of certiorari here applied for must be directed, if granted.

An assignment of errors in the Appellate Court of Illinois performs the same office as the declaration in the trial court.

Ditch v. *Sennott*, 116 Ill. 290.

McAllister & Schroeder v. *Weber Motor Car Co.*, 243 Ill. App. 530.

Butters v. *C. B. & Q. R. Co.*, 154 Ill. App. 275.

In the case of *Voges* v. *Davison*, 306 Ill. 357, the court said:

> "Various alleged errors are argued by plaintiff in error but no errors have been assigned on the record. There is, therefore, no issue for this court to try. The rule requiring that the assignment of errors must be written upon or attached to the record has been in force since the organization of this court, and this court has repeatedly held that a failure to assign errors requires a dismissal. *Ditch* v. *Sennott*, 116 Ill. 288; *Benneson* v. *Savage*, 119 *id.* 135; *McCormick* v. *Chicago and State Line Railway Co.*, 219 *id.* 593."

A rule identical with that laid down in the Illinois Supreme Court, making an assignment of errors an essential requisite to a review by that court, obtains in the Appellate Court of Illinois and has likewise been in force since the establishment of that court. *McAllister &*

Schroeder v. *Weber Motor Car Co.*, 243 Ill. App. 530, *supra*.

The failure of the record filed herein to disclose an assignment of errors in the Appellate Court of Illinois, deprives this court of jurisdiction to grant the writ applied for.

In the case of *Atlantic Coast Line R. R. Co.* v. *Mims*, 242 U. S. 532, at p. 536, the court said:

> "While it is true that a substantive federal right or defense duly asserted cannot be lessened or destroyed by a state rule of practice, yet the claim of the plaintiff in error to a federal right not having been asserted at a time and in a manner calling for the consideration of it by the state Supreme Court under its established system of practice and pleading, the refusal of the trial court and of the Supreme Court to admit the testimony tendered in support of such claim is not a denial of a federal right which this court can review. *Baldwin* v. *Kansas*, 129 U. S. 52; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, and therefore for want of jurisdiction, the writ of error is dismissed."

In *Hartford Life Insurance Co.* v. *Johnson*, 249 U. S. 492, 493, this court held:

> "The jurisdiction of this court to review the final judgment or decree of the highest court of a State, in such a case, as we have here, is defined in Sec. 237 of the Judicial Code, as amended * * *. It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice, * * * and upon the question whether or not such a claim has been so asserted the decision of the State Court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of federal right.'

Atlantic Coast Line R. R. Co. v. *Mims*, 242 U. S. 532, 535; *Gasquet* v. *Lapeyre*, 242 U. S. 367, 371, and cases cited."

To the same effect are:

Olympia Mining Co. v. *Kerns*, 236 U. S. 211.

Chesapeake & O. Ry. Co. v. *McDonald*, 214 U. S. 191.

Mellon v. *O'Neil*, 275 U. S. 212.

II.

If this court should decide that it has jurisdiction to entertain this petition, there is but one question to determine, viz., whether petitioner was guilty of negligence, as charged by respondent.

Petitioner's first specification of error in this court raises the naked legal question whether there is any evidence in the whole record which, from its reasonable intendments and inferences, fairly tended to make out respondent's case.

STATEMENT OF FACTS.

Respondent lived in a house on petitioner's premises just south of Canal street, an east and west street, and a short distance west of Cass street, in Peru, Indiana. He was required to live there and was subject to call at all hours (Rec. 89, 90).

It was necessary for him to pass over 5 tracks in petitioner's yard to get to his speeder, which was kept in a shanty or linemen's shop on the opposite side of the yard. He used this speeder in going from place to place over petitioner's lines.

The team track on which the accident happened was but a short distance south of respondent's house and was the first track to be encountered as he crossed the petitioner's premises to go to the linemen's shanty aforesaid. This track was customarily filled with standing cars at the time each morning when respondent was required to go to the place aforesaid to get his speeder (Rec. 98).

At the time of the accident, there was a long line of standing cars extending both to the east and the west of this house (Rec. 56, 70, 96). A coal car directly opposite his house was being unloaded and the men engaged therein had just started away from the side of this car with a load of coal at the time respondent attempted to cross over or between the standing cars (Rec. 57, 70, 113). Respondent had to do one of three things to get to the linemen's shanty where his speeder was kept. He could have left petitioner's premises, walked east 1,000 feet and crossed the tracks at Broadway, which would necessitate his walking back

the same distance alongside of or between these tracks (Rec. 148). He could have gone to the west several hundred feet to a point beyond the cars standing on the team and house tracks, but he would then be obliged to cross the tracks at a place where cars were liable to be switched onto the house tracks, where his view to the west would be obstructed by cars on the spur track (See petitioner's plat, Rec. 128; and photographs, Supp. Rec.). The third way to get to his speeder would be to cross over or between the cars and the team track, the course he pursued at the time of the accident and which he had been doing for a period of five years with the knowledge and consent of his boss or foreman (Rec. 99).

Before attempting to cross over or between the standing cars on the team track, he looked carefully both to the east and the west, but saw no cars in motion and received no warning or notice of any kind that cars were to be switched or "dropped" in on this team track (Rec. 97). It had been the uniform practice and custom of petitioner to notify all persons who were in or about the cars standing on this team track or engaged in loading or unloading any of them, when cars on this track were to be moved or when other cars were to be operated or propelled against them (Rec. 59, 60, 98, 99).

Petitioner propelled 9 cars, some of which were loaded, from a point more than 1,000 feet distant (See plat, Rec. 128 and Rec. 153), upon and against the cars standing on the team track with sufficient force and violence to move the whole string of standing cars 3 or 4 car lengths and to send coal "flying all over there" (Rec. 71, 80).

This movement was made not only in violation of the established practice and custom to give warning to all

persons engaged at work in or about the cars, but at an excessive rate of speed as well (Rec. 71, 73).

The ordinary switching movement at a reasonable and proper rate of speed, even if no warning had been given, obviously would not—or at least may not—have thrown respondent between the cars while he was crossing over or between them in the customary manner.

In the case of *Ill. Cent. R. R. Co.* v. *Skaggs*, 240 U. S. 66, at p. 69 of the opinion, it is said by the court:

> "It is contended that the State Court erred in permitting a recovery under the federal statute, for the reason that the injury resulted from Skagg's own act or from an act in which he participated. The company, it is said 'can not be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents or employees of the employing carrier or by reason of any defect or insufficiency due to its negligence in its property or equipment, April 22, 1908, 35 Stat. 65. But on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.
>
> "The inquiry must be whether there is neglect on the part of the employing carrier and if the injury to one employee resulted 'in whole or in part,' from the negligence of any of its other employees, it is liable under the express terms of the act."

The Appellate Court in its opinion found the following facts:

(1) That at the time respondent attempted to cross over or between the cars opposite to his house, there was a string of cars extending both to the east and west a distance of four or five hundred feet.

(2) That it became necessary for respondent, in the due course of his employment, to cross the tracks at this place.

(3) That he customarily did so each morning.

(4) That petitioner, having provided a habitation for respondent on its premises, it would be quite illogical to say that he would be required to leave those premises in order to again return to them for the purpose of obtaining his car.

(5) That it was customary for petitioner, when setting cars upon this team track, to send someone ahead in order to notify teamsters that cars were to be placed upon said track, in order that they might guard themselves against danger arising from the cars coming in contact with those standing on said track.

(6) That respondent had a right to rely upon the observance of this custom.

(7) That the standing cars in question were struck with unusual and unnecessary violence.

(8) That on the morning in question the unloading of the coal car had commenced at 6 o'clock.

(9) That men had been engaged at work in and about this car unloading coal therefrom onto a truck which had just started and which had reached a point but 30 or 40 feet from the place where it had been loaded when the crash occurred.

(10) That there was no notice given to anyone by petitioner that cars were to be placed on this track, contrary to its usual custom of sending someone ahead to warn persons lawfully in or about the cars.

(11) That respondent was not guilty of contributory negligence in assuming that petitioner would give the customary warning on the morning of the accident.

(12) That the cars which struck the standing cars proceeded onto and over the team track with considerable speed and that they struck the standing cars "with a great deal more force than was requisite under the circumstances."

All of these facts are amply supported by the evidence.

Section 122, Chapter 110, Cahill's Revised Statutes of Illinois, 1927, is as follows:

> "The Supreme Court shall re-examine cases brought to it by appeal or writ of *certiorari* as provided in this Act, from the Appellate Courts, as to questions of law only; and in the cases aforesaid, no assignment of error shall be allowed calling in question the determination of the inferior or Appellate Courts upon controverted questions of fact therein."

In *Myers* v. *Pittsburg Coal Co.*, 233 U. S. 184, the trial court submitted the case to the jury to determine whether the defendant was guilty of negligence as charged by the plaintiff, which resulted in the death of her husband, Myers.

On appeal, the Circuit Court of Appeals was of the opinion that upon the facts shown, the plaintiff had not made out the right to recover and the judgment was reversed without directing a new trial and without sending the case back. In the course of its opinion, in reversing the Court of Appeals, the Supreme Court at page 192, said:

> "Unless the testimony was such that no recovery could be had upon the facts shown in any view which could be properly taken of them, the verdict and judgment of the District Court must be affirmed."

"If upon any view which could be properly taken of the facts the evidence tended to establish" the jury

would have been justified in returning a verdict for the injured party, the question of contributory negligence will not defeat a recovery and is for the jury rather than for the court.

Dunlap v. *North Western Ry. Co.*, 130 U. S. 649, 32 L. ed. 1058, 9 S. C. 647.

To the same effect see

Louisville & N. Ry. Co. v. *Woodson*, 134 U. S. 614, 33 L. ed. 1032, 10 S. C. 628.

The general rule is again stated by this court that:

> "Where the facts are in dispute and the evidence in relation to them is that from which fair-minded men could draw different inferences, the question is one for the jury."

Washington & Georgetown Ry. Co. v. *McDade*, 135 U. S. 554, 34 L. ed. 235, 10 S. C. 1044.

III.

The question of assumed risk is not subject to review as it is raised for the first time in this court.

The record discloses that the question of assumed risk was not assigned as error in either the Appellate or Supreme Court of Illinois.

The only reference in the Appellate Court record to any alleged ground for reversal of the judgment by the Appellate Court is found in that court's opinion (Rec. 9) wherein the court said:

> "It is urged as a ground for reversal that from the testimony, the plaintiff * * * was guilty of contributory negligence and that the defendant was not guilty of negligence * * *."

In its petition for certiorari in the Supreme Court of Illinois (Rec. 12, 13), petitioner stated:

"The contention of the petitioner on the trial of this cause in the Superior Court and in the errors assigned for review in the Appellate Court, has been confined to two points:

First. That there is no evidence of any negligence on the part of the petitioner which resulted in injury to the respondent.

Second. That the trial court erred in allowing improper evidence to be submitted to the jury."

Under the caption "Jurisdiction of this Court" petitioner, in its petition, page 9, suggests that one of the controlling questions raised by it in the trial court was that respondent assumed the risk.

The question of assumed risk was submitted to the jury as a question of fact and is fully covered by petitioner's instructions which were more favorable to its contention than it was entitled to under the law (Rec. 219).

By its failure to assign error upon the question of assumption of risk in the Appellate and Supreme Courts of Illinois, petitioner abandoned this point as a ground for reversal.

It has been repeatedly held in both the Appellate and Supreme Courts of Illinois that errors assigned but not argued are waived.

Keyes v. *Kimmel,* 186 Ill. 109.
Duggan v. *Ryan,* 211 Ill. 133.
Pollock v. *Pollock,* 328 Ill. 179.
Jones v. *Beeck,* 197 Ill. App. 119, 120.
Rosenfeld v. *Ehrhart,* 202 Ill. App. 617, 618.

IV.

Even if plaintiff knew that cars were liable to be switched on to the team track in question and assumed the risk of these customary switching operations, nevertheless, he did not assume the increased risk attributable to the unusual and negligent manner in which these cars were operated.

Respondent and three witnesses testified that nine cars (some of which were loaded) were not operated in the usual and customary manner but were propelled against the standing cars on the team track, not only with unusual and unnecessary force and violence, but without any notice or warning to anyone in the vicinity, contrary to petitioner's recognized practice and custom.

In *Chesapeake & Ohio Ry. Co.* v. *Proffitt,* 241 U. S. 462, the court at page 468 said:

> * * * "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."

Choctaw O. & G. R. Co. v. *McDade,* 191 U. S. 68; 48 L. Ed. 96.

Seaboard Air Line v. *Horton,* 233 U. S. 492-502.

Chesapeake & Ohio Ry. Co. v. *DeAtley,* 241 U. S. 310.

V.

Weight to be given concurrent opinions of trial and Appellate Courts.

Bearing in mind that the trial court held the evidence in this case sufficient to go to the jury and that the Appellate Court concurred in the opinion of the trial court, the following statement is especially applicable:

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them."
>
> *Richmond & D. R. Co.* v. *Powers,* 149 U. S. 43, 37 L. ed. 642, 13 S. C. 748.

> "Hence it is that seldom an Appellate Court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an Appellate Court will pay large respect to his judgment, and if such judgment is approved by the proper Appellate Court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."
>
> *Patton* v. *Texas & Pac. Ry. Co.,* 179 U. S. 658, 45 L. ed. 361, 21 S. C. 275.

In the *Patton* case the trial court directed a verdict in favor of the defendant and this action was approved by the Appellate Court and later by the Supreme Court.

In the case of *Supreme Lodge K. of P.* v. *Beck,* 181 U. S. 48-50, 45 L. ed. 741, 21 Sup. Ct. 532, the *trial court refused to direct a verdict in favor of the defendant* and its action was affirmed by the Appellate Court. When the case came before the Supreme Court of the United States, Mr. Justice Brewer, speaking for the court, said:

> "We have recently had before us a case, coming like this from the Trial Court to the Court of Appeals (*Patton* v. *Texas & P. Ry. Co.,* 179 U. S. 658, *ante* 361, 21 S. C. 275), in which the action of the Trial Court in directing a verdict was vigorously attacked as an invasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower court; and the considerations which then controlled us compel a like action in the present case."

It is to be noted that the court in the *Beck* case seemed to be of the opinion that in the *Patton* case "the question was doubtful"—being the question of the right of the court to direct a verdict for the defendant—but its action was sustained because of the fact that it was concurred in by the lower Appellate Court.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of State trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre,* 242 U. S. 169.

Great Northern Ry. Co. v. *Knapp,* 240 U. S. 464.
Erie R. R. Co. v. *Welsh,* 242 U. S. 303.
Seaboard Air Line v. *Padgett,* 236 U. S. 668.

VI.

The authorities cited and relied on by petitioner do not support its contention that there was no duty imposed by law upon petitioner to warn respondent of the switching movement in question.

The cases cited by petitioner do not sustain its contention and may be readily distinguished from the instant case.

In *Toledo, etc., R. Co.* v. *Allen,* 48 Sup. Ct. 215, cited by petitioner (p. 12), the court specifically stated that there was no evidence in that case that the plaintiff had been exposed to any "unusual danger by reason of a departure from the practice generally followed."

Petitioner's contention that negligence is essential to recovery in an action under the Federal Employers' Liability Act is, of course, conceded. We have at no time contended otherwise.

The *Nixon* case, 271 U. S. 472, also cited and relied on by petitioner, is not in point, as there was no violation of a recognized practice and custom on the part of the defendant in that case, as here. The court in that case based its decision that the defendant could not be held liable, solely on the ground that the plaintiff assumed the risk.

In *Aerkfetz* v. *Humphries,* 145 U. S. 418, where no custom of warning was involved, the court held that a yard track employee assumed the risk of a shifting movement of cars without warning. Manifestly, the *Aerk-*

fetz case—wherein the accident happened on a "yard track," does not tend to support petitioner's contention, as in the instant case there was not only a violation of custom shown which was lacking in that case, but respondent's accident occurred on a team track where cars were being unloaded, and on which track cars were never moved or shifted without timely notice to all persons in and about said cars (Rec. 59, 60, 98, 99).

In *Director General of Railroads* v. *Templin*, 268 Fed. 483, at p. 486, the court said:

> "But in *McGovern* v. *P. & R. Ry. Co.*, 235 U. S. 389, 401, 35 Sup. Ct. 127, 59 L. Ed. 283, where there was evidence of a custom or practice to warn track walkers, the Supreme Court affirmed the action of the trial court in refusing to hold as a matter of law that the injured workman had assumed the risks of the danger and in submitting the question to the jury."

The case of *St. L. & San. Fran. R.* v. *Conarty*, 238 U. S. 243, 249, is obviously not in point, as the court simply held in that case that the violation of the Federal Safety Applicance Act in failing to have a car equipped with a coupler could not be said to have been the proximate cause of an injury occurring to a railroad employee who was not endeavoring or intending to couple or uncouple said car or to handle it in any way, but was merely riding on an engine that collided with it, since the act was passed to obviate the necessity of men going between the ends of cars to couple them.

We respectfully ask that the petition for certiorari herein be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Counsel for Respondent.

APPENDIX.

Section 121, Chapter 110, Cahill's Revised Statutes of Illinois, 1927:

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Court shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court." * * *

FILE COPY

Office Supreme Court
FILED
APR 29 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 620. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

NICK MIHAS,

Respondent.

BRIEF FOR NICK MIHAS, RESPONDENT.

JOSEPH D. RYAN,
JOHN P. BRAMHALL,
Counsel for Respondent.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

SUBJECT INDEX.

	PAGE
Jurisdiction	1
Statement of facts	6
Summary of argument	9
Argument	13
Appendix	42

TABLE OF CASES CITED.

	PAGE
Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 273	28
Baltimore & Ohio R. R. Co. v. Whitacre, 242 U. S. 169	35
Brown v. Ill. Terminal Co., 319 Ill. 326, 334	25
C. & A. R. R. Co. v. Kelly, 182 Ill. 267, 270	19
C. & N. W. Ry. Co. v. Thomson, Admx., 128 Ill. App. 594 (and cases cited)	21
Central Vermont Ry. Co. v. White, 238 U. S. 507; 59 L. Ed. 1433	23, 30
Chesapeake & O. Ry. Co. v. DeAtley, 241 U. S. 310	32, 34
Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462	32
Chicago City Ry. Co. v. Loomis, 201 Ill. 118, 119	24
Chicago City Ry. Co. v. Martensen, 198 Ill. 511, 512	24
Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558, 564	34
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64	32, 34
Davis v. C. R. I. & P. Co., 158 N. W. 911 (Minn.)	25
Davis v. Wolfe, 263 U. S. 239	19
Devine v. Chicago Junction Ry. Co., 167 Ill. App. 195	21
Director General of Railroads v. Templin, 268 Fed. 483	20
Donnelly v. Chicago City Ry. Co., 163 Ill. App. 7, 13-14	30

Duggan v. Ryan, 211 Ill. 133 29
E. St. Louis C. Ry. Co. v. Eggman, 170 Ill. 538 21
Ehrlich v. Chicago, G. W. R. Co., 160 Ill. App. 379 21
Engel v. C. B. & Q. R. R. Co., 111 Neb. 21; 195 N. W. 523 34
Fisher v. Perkins. 122 U. S. 522 5
Franklin Sugar Refining Co. v. Luray Supply Co., 6 Fed. (2d) 218 22
Freesen v. Scott County Drainage District, 283 Ill. 536, 544 28
Freitag v. Union Stock Yards Co., 262 Ill. 551 2
Gila Valley, etc., Ry. v. Hall, 232 U. S. 94; 58 L. Ed. 521 34
Great Northern R. Co. v. Knapp, 240 U. S. 464 33
Hall v. C. & A. R. Co., 188 Ill. App. 95 21
Harding v. Illinois, 196 U. S. 78, 83 31
Hodges v. The Bankers Surety Co., 152 Ill. App. 372, 390 29
Hudson & M. R. Co. v. Iorio, 239 Fed. 855 25
I. C. R. R. Co. v. Gilbert, 157 Ill. 354 21
Jones v. Veeck, 197 Ill. App. 119, 120 29
Kelly v. Chicago City Ry. Co., 283 Ill. 640 25
Keyes v. Kimmel, 186 Ill. 109 29
Knapp v. Great Northern Ry. Co., 130 Minn. 405 33
Kozowski v. Ostrowski, 163 Ill. App. 199, 203 29
Lehigh Valley R. Co. v. Doktor, 290 Fed. 760 .....20, 39
Louisville R. R. v. Layton, 243 U. S. 617 19
Mahlstedt v. Ideal Lighting Co., 271 Ill. 154, 163 ....24, 25
Matthews v. Huwe, 269 U. S. 262 5
McMasters, et al. v. Gould, et al., 72 L. Ed. (U. S. Sup. Ct. Advance Opinions, March 15, 1929), p. 337 5
Minneapolis R. R. v. Gotschall, 244 U. S. 66 21
Myers v. Pittsburg Coal Co., 233 U. S. 184 25
Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228 23
North Car. R. R. Co. v. Zachary, 232 U. S. 248 25

Otstot v. I. I. & I. R. R. Co., 103 Ill. App. 136, 139..... 21
Pacheco v. N. Y., N. H. & H. R. Co., 15 Fed. (2d) 467.. 21
Patton v. Texas & Pac. Ry. Co., 179 U. S. 658..... 35
Padgett v. Seaboard Air Line Ry., 99 S. C. 364; 83 S. E. 633 (affirmed 236 U. S. 668)..... 25
Penn. Co. v. Donat, 239 U. S. 50..... 25
Peters v. Chicago Rys. Co., 307 Ill. 202, 205.....24, 25
Pollock v. Pollock, 328 Ill. 179..... 29
Pridmore v. C. R. I. & P. Ry. Co., 275 Ill. 386..... 21
Richmond & Danville Rd. v. Powers, 149 U. S. 43, 45.. 26
Roberts v. C. C. C. & St. L. Ry. Co., 202 Ill. App. 480, 499-500 34
Roberts on Fed. Liability of Carriers, Vol. 1, Secs. 557, 558 (citing cases), also Sec. 461, p. 798.....25, 34
Rosenfeld v. Ehrhart, 202 Ill. App. 617, 618..... 29
Seaboard Air Line v. Horton, 233 U. S. 492.....32, 34
Seaboard Air Line v. Moore, 228 U. S. 433; 57 L. Ed. 907 30
Schlemmer v. Buffalo & C. Ry. Co., 220 U. S. 590.... 33
Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1; 51 L. Ed. 681 34
Southern Ry. Co. v. Lloyd, 239 U. S. 496, 501..... 25
St. L. A. & T. H. R. Co. v. Eggman, 161 Ill. 155..... 21
Supreme Lodge K. of P. v. Beck, 181 U. S. 49..... 35
Texas & Pacific Ry. Co. v. Cox, 145 U. S. 593..... 25
Toledo, St. L. & W. R. Co., et al. v. Bartley, 172 Fed. 82 20
Village of Northbrook v. Sterba, 318 Ill. 360, 363-364.. 30
Warren v. Jackson, 204 Ill. App. 576, 587..... 34

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 619.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.

NICK MIHAS,

Respondent.

BRIEF FOR NICK MIHAS, RESPONDENT.

JURISDICTION.

(For convenience, we shall hereinafter refer to respondent, Nick Mihas, as plaintiff, and to petitioner as defendant.)

In the brief filed in opposition to the defendant's petition for certiorari in this case, we urged that this court was without jurisdiction to entertain the petition, since the petitioner did not exhaust all of the remedies at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had * * *" in accordance with the provisions of Section 237 of the Judicial Code, as amended, Volume 43, Paragraph 1, U. S. Statutes at Large.

It is claimed by defendant that under Subdivision 2 of the Certiorari Law of Illinois, Section 121, Chapter 110, Revised Statutes of Illinois 1927, the Supreme Court may require by "certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court."

It is quite apparent that the statute in question simply conferred upon the State Supreme Court the discretionary power to require by certiorari any case coming within the classification designated to be certified to it for review. Had the Supreme Court of Illinois granted the writ of certiorari in the instant case, that court would not and could not, in the certiorari proceedings, have reviewed the case or entered judgment upon the merits therein, but having awarded the writ, would then cause the case to be docketed as any other cases of writ of error and proceed to review the case by writ of error and pass upon its merits.

The Constitution of the State of Illinois, Section 11, Article 6 (quoted in appendix) gives power to the General Assembly of the State to provide but two methods of review by the Supreme Court of a judgment of the Appellate Court, viz., *by appeal* or *by writ of error,* and any statutory enactment attempting to confer on the Supreme Court of that state, authority to review a judgment by any other method would be unconstitutional.

In the case of *Freitag* v. *Union Stockyard Co.,* 262 Ill. 551, where the Supreme Court of Illinois was passing upon the constitutionality of the State Certiorari Law here in question, that court, at p. 558, said:

> "The constitution, by section 11 of article 6, gives power to the General Assembly to provide for review

by this court of the judgments of the Appellate Court *by appeal* or *writ of error,* and counsel say that the General Assembly cannot devise any other method of review. The act making judgments of the Appellate Court final unless this court, by *certiorari* or otherwise, shall require the record to be brought to this court for review does not contemplate a review of the judgments by *certiorari.* The application for a writ is to enable this court to determine whether the case is of such a character that the judgment ought to be reviewed, and if the writ is awarded to bring the record here, the review is by writ of error. Our rule found in Vol. 242 of the reports of decisions was carefully framed under the act, in accordance with that view. It provides for docketing the petition for the writ in the name of the petitioner, against the respondent, but if the writ is granted the case is then docketed as in any other case of a writ of error. As a transcript must be filed with the petition, it is not necessary to send the writ to the clerk of the Appellate Court, but the transcript filed is to be taken and considered as a due return to the writ and a *scire facias* to hear errors is to be issued for all defendants in error of whom the court has not obtained jurisdiction by an appearance in opposition to the petition."

While it is true that language may be found in an occasional decision of the Supreme Court of Illinois indicating that the denial of writ of certiorari is equivalent to an affirmance of an Appellate Court judgment, as in *Soden* v. *Claney,* 269 Ill. 98, the fact remains that in certiorari proceedings, the Supreme Court does not review the judgment of the Appellate Court and does not in such proceedings enter a final judgment upon the merits of the case.

The Supreme Court of Illinois, neither under the constitution of the state nor under the certiorari statute, has the power or authority to review a case in a certiorari

proceeding. The language of the court in the *Soden* case, *supra,* that the denial of a petition for certiorari is "in effect an affirmance of the judgment," is necessarily true, not because the denial of the writ means that the Supreme Court has reviewed the case and affirmed the judgment of the court below upon the merits of the case, but merely because once the writ is denied, there is no other court of review to which the petitioner may apply, and hence there is no further opportunity afforded the petitioner to have his case reviewed.

In other words, the denial of a petition for certiorari by the Supreme Court of Illinois makes the judgment a final judgment of the Appellate Court and not a final judgment of the Supreme Court.

The cases of *Lamont* v. *Kent,* 253 Ill. 230, and *Rizzo* v. *Catholic Order of Foresters,* 274 Ill. 91, cited by defendant, are not in point, as in both cases the court had under consideration conflicting sections of the State Practice Act and Appellate Court Act, relative to the removal of cases from the Appellate to the Supreme Court, and the court was not called upon in either of these cases to pass upon the question now before this court.

In Section 121 of the Practice Act of Illinois, it is provided that:

> "In any such case as is hereinbefore made final in the said Appellate Courts, it shall be competent for the Supreme Court to require by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case and with like effect as if it had been carried by appeal or writ of error to the Supreme Court."

The Supreme Court of Illinois has not construed this language to mean that it is authorized in a certiorari pro-

ceeding, to review the judgment of an Appellate Court, as such construction would render that section of the Practice Act unconstitutional, but it has, pursuant to the construction set forth in the case of *Freitag* v. *Union Stockyard Co., supra,* and the rule of court mentioned therein, followed the practice, in cases where it grants the writ of certiorari, of thereafter issuing a writ of error, and then proceeding to review the case in such writ of error proceeding.

In view of the foregoing, we respectfully submit that under the authorities cited in our reply to defendant's petition for certiorari filed in this court, viz., *McMasters, et al.* v. *Gould, et al.,* 72 L. Ed. (U. S. Sup. Ct. Advance Opinions, March 15, 1929), p. 337; *Matthews v. Huwe,* 269 U. S. 262, and *Fisher* v. *Perkins,* 122 U. S. 522, this court is without jurisdiction to review this cause. Under the decisions rendered in these and the case of *Freitag* v. *Union Stock Yards Co.,* 262 Ill. 551, *supra,* the denial of the defendant's petition for certiorari by the Supreme Court of Illinois is not such a judgment as may be reviewed by the Supreme Court of the United States, since by its failure to make application to the Appellate Court for a certificate of importance, which, if granted, would have entitled defendant to have its case reviewed upon the merits and obtain a final judgment from the Supreme Court of Illinois, as a matter of right, the defendant did not exhaust all the remedies at hand for obtaining a final judgment or decree from the Supreme Court of Illinois.

STATEMENT OF FACTS.

Defendant's statement of the facts and the *locus in quo* is sufficiently accurate to apprise the court in a general way of the issues involved, but the reference made to the tracks in the yard in question as a "main track and switching lead and three house or team tracks" is quite liable to mislead. We, therefore, deem it essential to make a supplemental statement of our own, in order that the court may have a full understanding of all of the material facts and circumstances pertinent to the issues.

There is but one team track in this yard, viz., the north track, which curves to the south and connects with house track No. 1 at a point 270 feet west of the house in which plaintiff lived, and which runs eastward beyond the plaintiff's house approximately 450 feet and then curves northward across Canal street into the Peru Heating Plant (Defendant's Exhibit 1, R. 128). This team track on which plaintiff was injured is the only track in the yard alongside of which teams and wagons and other vehicles were driven for the purpose of unloading cars situated thereon.

Defendant's photographs, Exhibits 2, 3 and 4, show a clearly defined and much used and traveled driveway extending alongside of this track, which plaintiff testified was customarily used by teamsters in unloading cars for a distance of several hundred feet west of his house and all the way up to the spur track (R. 210). This team track must not be confused with house tracks No. 1 and No. 2 which lead up to the freight house and alongside of the loading platform on either side thereof.

The track just south of team track No. 3 on which the accident occurred, is known as No. 2 house track and ex-

tends along the north side of the loading platform, stopping at the freight house. This track also curves toward the south and connects with No. 1 house track at a point 105 feet east of where No. 3 team track connects with said house track. The next track south of No. 2 house track is known as No. 1 house track and also extends eastward along the south side of the loading platform and freight house in question.

It was necessary for the plaintiff, in order to reach the shanty or what is designated on Defendant's Exhibit 1 as a "lineman's shop"—the place where his speeder was customarily kept and housed—to cross all of these five tracks. This "lineman's shanty" is on the south side of all these tracks directly opposite the house in which he lived (R. 92).

Mihas, the plaintiff, and three witnesses called in his behalf, testified that on the morning of the accident, there was a long string of standing cars on the team track, extending both to the east and to the west of the house in which plaintiff lived (R. 56, 70, 81, 96). The string of cars west of plaintiff's house would necessarily extend onto house track No. 2, as there was room for but three cars on the team track in the clear west of plaintiff's house (R. 130). The team track was usually and customarily filled with standing cars each morning at the time plaintiff was required to cross the tracks to reach his speeder (R. 98). It had been the uniform practice and custom of the defendant to give notice and warning to the men who were engaged in unloading cars on this team track before moving the cars thereon or propelling other cars against the standing cars (R. 60, 72, 99).

Plaintiff had been crossing this track at the place in question for a period of 4 or 5 years with the knowledge

and consent of his boss or foreman (R. 99, 124). The customary method of warning men who were engaged in unloading these cars of any movement of cars on the team track was to send a switchman ahead alongside of the cars to personally tell these men that they were going to "drop cars in there." Plaintiff knew of this custom and relied upon it (R. 99). A coal car directly opposite plaintiff's house was being unloaded the morning of his injury and the men who had been engaged in this work had just moved away from the car a short distance with their second load of coal. Before starting to cross over or between the cars, plaintiff looked carefully in both directions, saw nothing coming and received no warning of any kind of the movement in question (R. 96).

As he was crossing over the track, nine cars—a number of which were loaded—were propelled by means of a flying switch from a point more than 1,000 feet distant on the main track, against the standing cars on the team track, with sufficient violence to move all of the cars on this track 3 or 4 car lengths and to send coal "flying all over there" (R. 71, 80). Cars thus set in motion could not, on account of intervening obstructions and the curve in the track, be seen by the plaintiff as he approached this team track. (See Defendant's photographs, Exhibits numbered 2, 3 and 4.)

It is admitted by defendant that no warning was given of the movement in question. The men engaged in this switching movement had taken these cars from the lead track in the vicinity of Cass street and while in that vicinity, were so situated that they could have observed plainly the men at work unloading the coal car (R. 176, 177).

Defendant contended on the trial that there were but three cars on the team track and that the east end of the

most easterly car was directly opposite the plaintiff's house (R. 176). Defendant made a check of the number of cars on this track each morning and had in its possession records, which it failed to produce, that would definitely show the number of cars thereon (R. 162, 163). The materiality of the respective contentions concerning the number of cars on this track will be pointed out and emphasized in our argument.

SUMMARY OF ARGUMENT.

1. (a) The movement of the nine cars on to the team track "with a great deal more force than was requisite" as found by the Appellate Court of Illinois, clearly constituted actionable negligence.

(b) Whether the added force and violence of this impact, which was sufficient to move a long string of cars three or four car lengths and to scatter coal "all over there" from one of the cars which had been partially unloaded (R. 71, 80, 97) was the proximate cause of the plaintiff's injury, was properly submitted to the jury for determination.

(c) Three of defendant's instructions (R. 220, 221), directing a verdict in its behalf, are predicated upon the essential requirement that the jury find that the switching operation was conducted in the "ordinary and customary manner."

2. (a) Plaintiff had the right to rely upon the observance of the recognized practice and custom to warn persons engaged in unloading cars on this team track and to conform his actions in respect thereto.

C. & A. R. R. Co. v. *Kelly*, 182 Ill. 267.
Pridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.

Louisville R. R. v. *Layton*, 243 U. S. 617.
Minneapolis R. R. v. *Gotschall*, 244 U. S. 66.
Lehigh Valley R. Co. v. *Doktor*, 290 Fed. 760.
Director General of Railroads v. *Templin*, 268 Fed. 483.
I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.

(b) Plaintiff having crossed this team track every morning for several years prior to his injury between cars standing thereon, with the knowledge and consent of his foreman, notice of such practice and custom was imputable to defendant (R. 99).

(c) Had the custom of sending a man ahead alongside of the cars been followed, plaintiff would have been apprised of the switching movement and the accident would not have occurred.

3. Evidence of a violation of the custom to give warning before switching cars on to the team track was properly admissible under the laws of Illinois and the decisions of the highest court of that state.

C. & A. R. R. v. *Kelly*, 182 Ill. 267.
Pridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.
I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.
St. L. A. & T. H. R. Co. v. *Eggman*, 161 Ill. 155.
E. St. L. & C. Ry. Co. v. *Eggman*, 170 Ill. 538.
Otstot v. *I. I. & I. R. R. Co.*, 103 Ill. App. 136, 139.
Erlich v. *Chicago, G. W. R. Co.*, 160 Ill. App. 379.

This court, under its decisions, is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony.

Nashua Savings Bank v. *Anglo-American Co.*, 189 U. S. 221, 228.
Central Vermont R. R. Co. v. *White*, 238 U. S. 507.
Bucher v. *Cheshire R. R. Co.*, 125 U. S. 55.

Franklin Sugar Refining Co. v. *Luray Supply Co.*, 6 Fed (2d) 218, 220, and cases there cited.

4. (a) Defendant's contention that a verdict should have been directed in its favor raises the naked legal question whether there is any evidence in the whole record which from its reasonable intendments and inferences, fairly tended to make out plaintiff's case.

Chicago City Ry. Co. v. *Martensen*, 198 Ill. 511, 512.

Chicago City Ry. Co. v. *Loomis*, 201 Ill. 118, 119.

Mahlstedt v. *Ideal Lighting Co.*, 271 Ill. 154, 163.

Peters v. *Chicago Rys. Co.*, 307 Ill. 202, 205.

(b) The plaintiff is entitled to have his case submitted to the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts that the evidence tends to establish.

Texas & Pac. Ry. Co. v. *Cox*, 145 U. S. 593, 606.

Richmond & Danville Rd. v. *Powers*, 149 U. S. 43, 45.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.

5. By its failure to assign error upon the question of assumption of risk in the Appellate and/or the Supreme Courts of Illinois, defendant abandoned the question and it is not subject to review in this court (Assignment of Errors in Appellate Court, R. 224, erroneously captioned as in the Supreme Court of Illinois. Assignment of Errors in Supreme Court of Illinois, R. 3).

Freesen v. *Scott County Drainage District*, 283 Ill. 536, 544.

Anglo-Wyoming Oil Fields v. *Miller*, 216 Ill. 272, 273.

Hodges v. *The Bankers Surety Co.*, 152 Ill. App. 372, 390.

Kozowski v. *Ostrowski*, 163 Ill. App. 199, 203.
Keyes v. *Kimmel*, 186 Ill. 109.
Duggan v. *Ryan*, 211 Ill. 133.
Pollock v. *Pollock*, 328 Ill. 179.
Jones v. *Veeck*, 197 Ill. App. 119, 120.
Rosenfeld v. *Ehrhart*, 202 Ill. App. 617, 618.
Harding v. *Illinois*, 196 U. S. 78, 83.

6. (a) If this court should decide that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted and should further hold that the subject of assumed risk had not been abandoned in the state courts and is open to review here, nevertheless the facts in evidence afforded no ground for the application of the doctrine of assumption of risk.

Yazoo & Miss. Valley R. R. v. *Wright*, 235 U. S. 376.
Central Vermont Ry. v. *White*, 238 U. S. 510.

(b) In any event if the doctrine of assumed risk is applicable to the facts in evidence, that question was properly submitted to the jury for determination.

Knapp v. *Great Northern Ry. Co.*, 130 Minn. 405 (affirmed 240 U. S. 464).

7. In the absence of clear and palpable error, this court will not disturb the concurrent findings of state, trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre*, 242 U. S. 169.
Patton v. *Texas & Pac. Ry. Co.*, 179 U. S. 658.
Supreme Lodge K. of P. v. *Beck*, 181 U. S. 48, 50.

8. The cases cited by defendant are to be distinguished in that in none of them was there involved a violation of any custom or rule of the defendant, or any unusual movement creating an extraordinary danger or hazard.

Chesapeake & Ohio Ry. Co. v. *Deatley*, 241 U. S. 310.

Gila Valley, etc., Ry. v. *Hall*, 232 U. S. 94.

Knapp v. *Great Northern Ry. Co.*, 240 U. S. 464.

ARGUMENT.

I.

1. (a) The movement of the nine cars on to the team track "with a great deal more force than was requisite" as found by the Appellate Court of Illinois, clearly constituted actionable negligence.

(b) Whether the added force and violence of this impact, which was sufficient to move a long string of cars three or four car lengths and to scatter coal "all over there" from one of the cars which had been partially unloaded (R. 71, 80) was the proximate cause of the plaintiff's injury, was properly submitted to the jury for determination.

Defendant contends under Point II of its argument (Brief, pp. 12, 13) that "there was no evidence that the mere added violence of the impact was the proximate cause of the injury to Mihas" and further that even if it be conceded that the cars were propelled against those standing on the team track with "more force than was reasonably requisite" and that "the mere added violence of the impact" was the proximate cause of the plaintiff's injury, these facts would not constitute negligence since "Mihas

was in a place where he had no right to be and his presence there was unknown and unsuspected." This is clearly a mistaken view of the situation and ignores entirely the primary duty imposed upon the master to exercise ordinary care for the safety of its servant.

There is no dispute in the record that it was plaintiff's custom and practice to cross between standing cars on this team track and that he had done so for a number of years with the knowledge and consent of his foreman (R. 99). Under these circumstances, knowledge of plaintiff's practice was imputable to defendant.

The fact that the plaintiff was the only employee who lived on defendant's premises and who customarily crossed the tracks at the place of the accident, does not affect the primary duty which defendant owed to him, nor does it exempt the defendant from liability for the consequence of its negligence in operating the cars in question at an excessive rate of speed and "with a great deal more force than was requisite under the circumstances," as found by the Appellate Court of Illinois. In the light of the undisputed evidence that plaintiff had customarily crossed the tracks every morning for a number of years on his way to his speeder, with the knowledge and implied consent of his foreman, there is no basis for the claim that plaintiff was in a place "where he had no right to be" and where his presence "was unknown and unsuspected."

The contention that defendant owed the plaintiff no duty in the circumstances is manifestly untenable and if adopted in the case at bar, would necessarily lead to the conclusion that the defendant would be under no legal obligation to exercise any care not to injure any number of its employees, had they been required to live in the house occupied by plaintiff and to cross the track in question in the course of their employment.

If the cars in question were propelled with unusual and unnecessary force and violence against the standing cars on the team track—as found by the Appellate Court of Illinois—apart from any violation of the custom to warn the teamsters, then the defendant was clearly guilty of negligence and the plaintiff could not be held to have assumed the increased risk attributable to the negligent departure from the customary method of switching these cars. Had the customary method been followed, and had the cars been propelled against those standing on the team track in the usual manner, we submit that plaintiff could have passed over or between them in safety.

Concerning the force or violence of the impact when the nine cars were propelled against those standing on the team track, plaintiff testified (R. 96):

> "Q. Now what did you do? You say you saw a truck unloading coal. Tell us from then on what happened, what you did before you started to c s the track.
>
> "A. Well, I see the truck on the north side of the house. I thought it was safe, see. I look on one side, I look the other side for anything moving, anything around. I don't see nothing coming and I climb the car, and there was coal car there, and I climb over the coal car. As soon as I get the car and before I get the car, I was ready to get on the top of the car, see? and I heard hit the cars so hard, and it thrown me inside of the cars in there."

And further (R. 97):

> "Q. What was your position? Were you on the stirrup on the end of the car or passing between them or what?
>
> "A. No, I had got on two step. On two step I was. I was ready to get on car. I was just going in between the cars.
>
> "Q. What cars were you passing between, the coal car and some other car?

"A. I had my hand on coal car, see, and box car was on the side. As soon as I put my toes up when then he hits me then.

"Q. What kind of a bump was it?

"A. Oh, it was terrible. * * *"

The unusually violent movement caused these cars to move suddenly and unexpectedly three or four car lengths (R. 71, 80) and the added violence of the impact undoubtedly created an unusual danger or extraordinary hazard. It was clearly a question for the jury in the circumstances whether the unusual danger and hazard created by the added force or violence was the proximate cause of plaintiff's injury.

That the movement of the nine cars on to the team track "with a great deal more force than was requisite" constituted actionable negligence, was recognized in principle by the defendant, since in three of the instructions offered by the defendant and given on its behalf to the jury, it was made an essential requisite to a recovery by the plaintiff that the jury find that the switching operation was conducted in the "ordinary and customary manner" (R. 220, 221).

It is not essential in order to constitute proximate cause, that the precise injury which resulted from the defendant's negligence should have been foreseen and defendant's argument that it owed the plaintiff no duty because he was at a place "where he had no right to be" and where "his presence was unknown and unsuspected" is manifestly based on a false premise.

II.

Plaintiff had the right to rely upon the observance of the recognized practice and custom to warn persons engaged in unloading cars on this team track and to conform his actions in respect thereto.

Plaintiff based his right to recover on the evidence submitted by him that there was a departure from the switching practice customarily followed in that yard, (1), in that the cars in question were propelled against the standing cars on the team track with unusual and unnecessary force and violence, and (2), that the custom of sending someone ahead to notify teamsters that cars were to be placed on the team track in order that these men might guard themselves against the danger arising from the cars coming in contact with those standing on said track, had not been observed.

Defendant conceded on the trial and the Appellate Court found that no warning had been given to these men who had been engaged in unloading on this track and who had just started away with their truck from the side of the coal car when the impact occurred (R. 98, 99).

Defendant argues (Brief, pp. 14, 15) that the Appellate Court of Illinois erred in holding that the custom to notify persons unloading cars on the team track "whenever defendant was about to run cars in and upon said track," inured to the benefit of plaintiff, since "he was not within the class of persons intended to be protected thereby." And further that even if it were true that there was a duty on the part of defendant to give notice and warning "which is not believed to be the case, since these men had finished unloading and were leaving the premises," nevertheless, under the decisions of this court, a breach of that duty re-

sulting in an injury to an employee such as here, would not as to him be actionable.

It will be observed that at the time the cars in question were set in motion at a point 300 feet west of the switch leading from house track No. 1 on to the main track (R. 201), or approximately 1,200 feet from the team track, the men engaged in unloading the truck were either on the car unloading it or in close proximity to it. These cars had been moved westward from the lead track on to the main track from a place directly alongside of where the work of unloading was in progress and defendant's servants had ample notice of the fact that these men were so engaged (R. 176-177). It is quite apparent that no attempt was made by these employees to determine whether these cars could, with safety, be propelled against those standing on the team track. The movement was made in utter disregard of the safety of these men who, unquestionably, were at work in and about the coal car at the time these cars were set in motion and who were but 30 or 40 feet from the side of the coal car at the moment of the impact (R. 70).

It is likewise apparent that had defendant sent someone ahead alongside of the car that was being unloaded to warn the men thus engaged that cars were to be propelled on to the team track and against those standing there, plaintiff would have seen him. It will be observed also that the truck load of coal had moved but 30 or 40 feet from the side of the car and that the nine cars, some of which were loaded, were propelled against the standing cars on the team track with sufficient violence to move all of the cars on this track three or four car lengths and to send coal "flying all over there" (R. 71, 80).

In support of its contention that the custom to warn men, who were working in and about and unloading cars stand-

ing on the team track, when they were about to be moved or others propelled against them, did not inure to the benefit of the plaintiff because he was not within the class of persons intended to be protected thereby, defendant relies upon the case of *St. L. & San Fran. R. R.* v. *Conarty,* 238 U. S. 243, 249. We submit that this case does not support its contention, since the court there merely decided that the absence of automatic couplers from one of the cars involved in the collision which resulted in injury to the plaintiff in that case, was not the proximate cause of the collision and injury. This decision was so construed in the case of *Davis* v. *Wolfe,* 263 U. S. 239, wherein the court reaffirmed the doctrine announced in the case of *Louisville R. R.* v. *Layton,* 243 U. S. 617, to the effect that where a failure of a railway company to comply with the Safety Appliance Act, is the proximate cause of an accident resulting in injury to an employee while in the discharge of his duty, he may recover, even though the operation in which he was engaged was not of the kind in which the appliances required by the act were specifically designed to furnish the protection. It is said (Opinion, p. 621):

> "The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured."

And the court further distinguishes the *Conarty* case, 238 U. S. 243, *supra,* as well as the *Lang* case, 255 U. S. 455, and quotes with approval from the latter case that "necessarily there must be a causal relation between the fact of delinquency and the fact of injury."

In *C. & A. R. R. Co.* v. *Kelly,* 182 Ill. 267, appellee's intestate, at the time of his death, was in the employ of the

United States as a mail clerk. It was his duty to transfer mails to and from various trains arriving and departing from the depot. While so employed and while crossing one of defendant's tracks, he was struck by an engine of a freight train and killed. On the trial, appellee introduced in evidence certain rules of the defendant in effect requiring approaching trains to come to a stop before reaching a train which was then stopped at the station and that trains must not exceed 6 miles an hour when passing through incorporated cities and towns. In determining whether deceased was in the exercise of ordinary care for his own safety it is said, p. 270:

> "To properly determine this question, it should be borne in mind that the appellee's intestate had been a transfer clerk in the United States mail service, at this junction, for more than a year before his death. *It is reasonable to infer from his length of service he was acquainted with the rules of appellant in respect to the running of its trains, and that he would, in the exercise of ordinary care, conform his actions in respect thereto.*" (Italics ours.)

The court also held that a rule of the post office department regulating the conduct of clerks in the transfer of mail was admissible in evidence, since the defendant, as part of its business, transported mails; that being in a sense in the same line of employment with the deceased in handling the mail it was familiar with the rule in question and was familiar with his duties and should have expected his presence at the time and place in question in the discharge of his duties under such rule.

To the same effect are:

Lehigh Valley R. Co. v. *Doktor*, 290 Fed. 760.

Director General of Railroads v. *Templin*, 268 Fed. 483.

Toledo, St. L. & W. R. Co., et al. v. *Bartley*, 172

Fed. 82.

Pacheco v. *New York, N. H. & H. R. Co.*, 15 Fed. 2d, 467.

Fridmore v. *C. R. I. & P. Ry. Co.*, 275 Ill. 386.

Otstot v. *I. I. & I. R. R. Co.*, 103 Ill. App. 136, 139.

I. C. R. R. Co. v. *Gilbert*, 157 Ill. 354.

St. L. A. & T. H. R. Co. v. *Eggman*, 161 Ill. 155.

E. St. L. C. Ry. Co. v. *Eggman*, 170 Ill. 538.

Ehrlich v. *Chicago, G. W. R. Co.*, 160 Ill. App. 379.

C. & N. W. Ry. Co. v. *Thomson, Admx.*, 128 Ill. App. 594 (and cases cited).

Devine v. *Chicago Junction Ry. Co.*, 167 Ill. App. 195.

Hall v. *C. & A. R. Co.*, 188 Ill. App. 95.

While it is true that facts which create a relation and therefore a duty as to one person, do not necessarily establish the same obligation to another person or class of persons not intended to be protected thereby, nevertheless where facts are shown which make the reason for claiming a relation applicable, then such other person or class of persons are within the right created.

In *Minneapolis R. R.* v. *Gotschall*, 244 U. S. 66, wherein a brakeman was thrown from a car as the result of defective couplers becoming open while the train was in motion, it was held that the employee was entitled to recover because the defective coupler was the proximate cause of the accident.

The Safety Appliance Act was designed and intended to obviate the necessity of men going between the cars to couple and uncouple them, yet the court based its decision that Gotschall was entitled to recover—his injury having been shown to have been proximately caused by the defective coupler—on the ground that the safety appliance laws were not confined in their terms to the protection of employees only when engaged in coupling or uncoupling cars.

It is manifest from the decisions in all of these cases that these laws inure to the benefit of a different class of persons than those intended to be protected thereby.

We respectfully submit that proof of an established practice and custom to warn men while engaged in unloading cars on the team track in question inured to the benefit of all of defendant's employees who knew of such custom and relied upon it. The cases cited by defendant in support of its contention that it owed no duty to the plaintiff because failure to give notice or warning of the switching operation to others differently situated from plaintiff was not as to him actionable, are inapplicable to the case at bar, as in these cases there was no causal connection shown between the negligent acts complained of and the resulting injuries.

III.

3. Evidence of a violation of the custom to give warning before switching cars on to the team track was properly admissible under the laws of Illinois and the decisions of the highest court of that state.

This court, under its decisions, is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony.

In the case of *Franklin Sugar Refining Co.* v. *Luray Supply Co.*, 6 Fed. 2d, 218 (Cir. Ct. of Appeals, 4th District), at p. 220, the court said:

> "The fact that this court is bound by and should follow the decision of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United States (R. S. 721, 914) Comp. St. 1538, 1537), as by the decisions of its courts. *McNeil* v. *Holbrook*, 12 Pet. 84, 9 L.

Ed. 1009; *Vance* v. *Campbell*, 1 Black, 427, 17 L. Ed. 168; *Conn. Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 5 S. Ct. 119, 28 L. Ed. 710; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 55, 8 S. Ct. 974, 31 L. Ed. 795; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 228, 23 S. Ct. 517, 47 L. Ed. 782; *Central Vermont R. R. Co.* v. *White*, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1436, * * *."

In *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, the rule is announced that this court considers only assignments relating to matter of practice, pleading and evidence which involves a construction of the Federal statute. It is said, p. 509:

> "Some of the assignments in the present case relate to matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions, and the various rulings of the trial court which involve no construction of the Employers' Liability Act and which, therefore, cannot be considered on writ of error from a State Court. *Seaboard Air Line* v. *Duvall*, 225 U. S. 477, 486."

And at pages 515, 516, it is said:

> "Assignments 25 and 27 relate to the refusal of the court to permit testimony as to the delivery and contents of the 'clearance card' and the refusal to permit the Railway Company to show that under the Federal law all engines, including 708, had been inspected and found to be in good condition. They both raise questions of general law. They involve no construction of the Federal statute and neither directly nor indirectly affect any Federal right. Those assignments, therefore, under Jud. Code, Sec. 237; Rev. Stat., Sec. 709, will not be reviewed on a writ of error to a state court. *Seaboard Air Line* v. *Duvall*. See also *Chicago Junction Ry.* v. *King*, 222 U. S. 222, and *Yazoo & Miss. R. R.* v. *Wright*, 235 U. S. 376, which state the rule where similar cases are brought here by writ of error to a Federal Court."

Under the overwhelming weight of authority, as shown by the decisions heretofore cited, evidence of the practice and custom in question was properly admissible under the law of Illinois and the rules of practice in the courts of that state.

The admission of this evidence deprived defendant of no substantive right or defense. The rule making evidence of a practice and custom of the defendant, in the conduct of its business and the operation of its engine and cars at the place in question admissible, is a just and reasonable one. It was not only proper for the plaintiff, but it was his duty to conform his actions and conduct to the practices and customs of his employer, of which he had knowledge. If the plaintiff had suffered injury by reason of his failure to conform his actions to a practice or custom of the defendant with which he was familiar, it would have been proper for the defendant to introduce evidence of such practice or custom. It could not be said in such a case that admission of such practice or custom in evidence would destroy any substantive right of the plaintiff under the Federal Act.

IV.

Defendant's contention that a verdict should have been directed in its favor raises the naked legal question whether there is any evidence in the whole record, which from its reasonable intendments and inferences fairly tended to make out plaintiff's case.

Chicago City Ry. Co. v. *Martensen,* 198 Ill. 511, 512.

Chicago City Ry. Co. v. *Loomis,* 201 Ill. 118, 119.

Mahlstedt v. *Ideal Lighting Co.,* 271 Ill. 154, 163.

Peters v. *Chicago Rys. Co.,* 307 Ill. 202, 205.

(a) In passing on a motion to direct a verdict, the court must look to the evidence supporting the claim of the party against whom the motion is directed in the light most favorable to him without considering contradictory evidence or weighing the evidence.

Mahlstedt v. *Ideal Lighting Co.*, 271 Ill. 154, 163.
Kelly v. *Chicago City Ry. Co.*, 283 Ill. 640.

(b) Where under all the evidence any question of fact exists or where reasonable minds could draw different inferences from circumstances shown without contradiction, the case must be submitted to the jury.

Peters v. *Chicago Rys. Co.*, 307 Ill. 202, 205.
Roberts on Federal Liability of Carriers, Vol. 1, Sec. 461, p. 798.
Hudson & M. R. Co. v. *Iorio*, 239 Fed. 855.
Southern Ry. Co. v. *Lloyd*, 239 U. S. 496, 501.
Brown v. *Illinois Terminal Co.*, 319 Ill. 326, 334.
Penn. Co. v. *Donat*, 239 U. S. 50.
North Car. R. R. Co. v. *Zachary*, 232 U. S. 248.
Davis v. *Chicago, R. I. & P. Co.*, 158 N. W. 911 (Minn.).
Padgett v. *Seaboard Air Line Ry.*, 99 S. C. 364, 83 S. E. 633 (affirmed 236 U. S. 668).

(c) The plaintiff is entitled to have his case submitted to the jury, unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which could be properly taken of the facts that the evidence tends to establish.

Myers v. *Pittsburg Coal Co.*, 233 U. S. 184.
Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593, 606.

(d) Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact; and this is true whether the

uncertainty arises from a conflict in the testimony or because the facts being undisputed, fair minded men will honestly draw different conclusions from them.

Richmond & Danville Rd. v. *Powers,* 149 U. S. 43, 45.

The controverted question concerning the number of cars on the team track becomes vitally important in determining whether the defendant was negligent and whether the plaintiff was in the exercise of ordinary care for his own safety.

Plaintiff and three of his witnesses testified that there was a long line of cars extending both to the east and to the west of plaintiff's house at the time of the accident. The cars extending westward would necessarily obstruct plaintiff's view of the oncoming cars.

Plaintiff's witnesses further testified that the nine cars were impacted against those standing on the team track with sufficient violence to move them three or four car lengths. Had there been but three cars on this team track, as contended by the defendant, with a clear space to the east of them, such an impact would undoubtedly have moved them a much greater distance. Further, had there been but three cars on this track and if the east end of the coal car—the most easterly car—was opposite to plaintiff's house, why should he walk toward the west and then attempt to climb over or between the cars if there was a clear open space directly between his house and the place where his speeder was kept? And even if there had been but three cars on this track and had plaintiff walked across the track toward his speeder in the open space east of the coal car, he would have been injured just as surely by the unexpected and violent movement of these cars as if he had been crossing between them.

If plaintiff's evidence to the effect that there was a long string of cars customarily on this team track every morning at the time he crossed the tracks in question, as well as on the morning of the accident, was untrue, it is reasonable to assume that defendant would have produced its records on the trial to refute such evidence and to show that there were but three cars on this track. Its failure to do so raises a presumption against the defendant and in favor of the plaintiff on this controverted question of fact.

Defendant contended throughout the trial that the three cars on the team track were in the clear of No. 1 house track, and that there were no cars standing on house track No. 2 (R. 176, 180).

Defendant's witness, Pope, in response to a question asked on cross-examination (R. 186, 187) as to why he did not make the movement in question from the house track onto the team track, instead of from the main track, stated:

> "Why, I didn't have room unless I cut off and went in and shoved them cars."

This notwithstanding there was "practically about 500 feet" along house track No. 1 (R. 187) between the switch leading from the main track to the switch connecting with the team track. And again (R. 188) this witness was asked:

> "Q. Then you did not have room on the team track for the nine cars? A. No, unless I went in and shoved them up and made room."

It will be observed from the foregoing that the testimony of plaintiff and his witnesses to the effect that there was a long string of cars extending westward from plaintiff's house onto house track No. 1, was unquestionably correct, and that these cars obstructed plaintiff's view of the switching movement in question when the nine cars were

set in motion from a point approximately 1200 feet west of his house and that such a movement could not in the circumstances have reasonably been anticipated by him (R. 141, 142, 201 and see defendant's plat, R. 128).

V.

By its failure to assign error upon the question of assumption of risk in the Appellate and/or the Supreme Courts of Illinois, defendant abandoned the question and it is not subject to review in this court (Assignment of Errors in Appellate Court, R. 224, erroneously captioned as in Supreme Court of Illinois. Assignment of Errors in Supreme Court of Illinois, R. 3).

Not only did the defendant fail to assign error on the subject of assumed risk in the Appellate and Supreme Courts of Illinois, as an examination of the record discloses, but it is evident from the Appellate Court opinion that there were but two assignments of error relied on for reversal in that court. In its opinion (R. 9) the Appellate Court said:

> "It is urged as ground for reversal that from the testimony, the plaintiff, in attempting to cross over the cars in question, was guilty of contributory negligence and that the defendant was not guilty of negligence in making the flying switch in question."

It has been repeatedly held in both the Supreme and Appellate Courts of Illinois that alleged error which is not assigned, even though it be argued or discussed in the appellants' brief, is waived and will not be considered by the reviewing court.

Freesen v. *Scott County Drainage District*, 283 Ill. 536, 544.

Anglo-Wyoming Oil Fields v. *Miller*, 216 Ill. 272, 273.

Hodges v. *The Bankers Surety Co.*, 152 Ill. App. 372, 390.

Kozowski v. *Ostrowski*, 163 Ill. App. 199, 203.

The rule has also been repeatedly laid down that errors assigned but not argued are likewise waived and will not be passed upon.

Keyes v. *Kimmel*, 186 Ill. 109.

Duggan v. *Ryan*, 211 Ill. 133.

Pollock v. *Pollock*, 328 Ill. 179.

Jones v. *Veeck*, 197 Ill. App. 119, 120.

Rosenfeld v. *Ehrhart*, 202 Ill. App. 617, 618.

In view of the failure of defendant to assign error on the question of assumption of risk in either the Appellate or Supreme Courts of Illinois, and the fact that it appears from the opinion of the Appellate Court that this question was not relied upon in that court, we submit that the defendant has abandoned the subject of assumed risk as a ground for reversal, and it is not properly before this court for review.

Defendant contends that its assignments of errors in both the Appellate and Supreme Courts are broad enough to cover the defense of assumption of risk; that the instructions to the jury show that it was made an issue in the trial court and that "the defense of assumption of risk was pressed in the petition for writ of certiorari" in the Supreme Court of Illinois.

It is not questioned that assumption of risk was in issue in the trial court and that the jury were fully instructed on this subject, but as heretofore suggested, this defense was abandoned in the Appellate and Supreme Courts by defendant, since it failed to assign error in either court on this subject. The fact that it was sought to be revived in the petition for certiorari in the Supreme Court of Illi-

nois, does not remedy the situation, first, because it was not mentioned or referred to in the assignment of errors in that court and, second, because even if it had been assigned and argued in the Supreme Court of Illinois, that court would not and could not consider or pass upon it, since it was not referred to or contained in the assignment of errors in the Appellate Court of Illinois.

A brief reference to the authorities shows that defendant's assignments of errors in the Appellate and Supreme Courts are not broad enough to include assumption of risk, as it is the rule in Illinois that "every error of which complaint is made, must be specifically pointed out in the assignment of errors." *Village of Northbrook* v. *Sterba,* 318 Ill. 360, 363-364.

Under the Federal Employers Liability Act, the burden of proving that plaintiff assumed the risk is upon the defendant.

Seaboard Air Line Railway v. *Moore,* 228 U. S. 433; 57 L. Ed. 907.

Central Vermont Ry. Co. v. *White,* 238 U. S. 507; 59 L. Ed. 1433.

There is not the slightest reference to this affirmative defense in defendant's assignments of errors in either the Illinois Appellate and Supreme Courts and their general assignments of errors relative to the refusal of the court to grant defendant a new trial or to find the defendant not guilty at the close of the plaintiff's evidence, or at the close of all the evidence, do not cover or include the defense of assumption of risk.

In the case of *Donnelly* v. *Chicago City Ry. Co.,* 163 Ill. App. 7, the court said, pp. 13-14:

"A considerable portion of the reply brief of the appellant is given to a discussion of its claim that the

present suit cannot be prosecuted as being barred by the Statute of Limitations, and our attention is again called to the matter by the petition for rehearing. No assignment of error is based specifically upon the proposition that the suit is barred by the Statute of Limitations. In the petition for rehearing, it is insisted that assignments 1, 2, 3 and 13 are sufficient to warrant the court in passing upon the point mentioned. These assignments are:

"'The verdict is against the evidence.

"'The verdict is against the weight of the evidence.

"'The verdict is against the law.

"'The trial court erred in refusing to instruct the jury at the close of all the testimony in the case to find the appellant not guilty.'

"The contention is not specifically covered by any ground urged on the motion for a new trial, and we think on the authority of *Berry* v. *City of Chicago*, 192 Ill. 154, that it is not raised by any assignment of error. In that case the court held:

"'Every error must be specifically pointed out in the assignment of errors so clearly that from the showing error is manifest, and an error not assigned is not open to review,'

thus reaffirming what was said in *Skakel* v. *People*, 188 Ill. 291; *Swift & Co.* v. *Fue*, 167 Ill. 443; *Gibler* v. *City of Mattoon*, 167 Ill. 18."

In the case of *Harding* v. *Illinois*, 196 U. S. 78, at p. 83, the court said:

"This court has no general power to review or correct the decisions of the highest State court and in cases of this character exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under Federal authority. *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380. * * * But neither the petition for a rehearing or petition for writ of error in the State Court after judgment, or

assignments of error in this court, can supply deficiencies in the record of the State Court, if any exist. *Simmerman* v. *Nebraska,* 116 U. S. 54. Nor does the certification of the briefs by the clerk of the State Supreme Court, which are no part of the record, help the matter. *Zadig* v. *Baldwin,* 166 U. S. 485. We are to try the case upon the duly certified record, legally made in the State Court and upon which its decision rests. *Powell* v. *Brunswick County,* 150 U. S. 433, 439."

VI.

If this court should decide that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted and should further hold that the subject of assumed risk had not been abandoned in the state courts and is open to review here, there is sufficient evidence in the record to show that this question was properly submitted to the jury.

Plaintiff and three witnesses testified that the cars in question were not operated in the usual and customary manner, but were propelled against the standing cars on the team track with unusual and unnecessary force and violence.

In *Chesapeake & Ohio Ry. Co.* v. *Proffit,* 241 U. S. 462, the court at page 468 said:

> * * * "Even if plaintiff knew and assumed the risks of an inherently dangerous method of doing the work, he did not assume the increased risk attributable not to the method, but to negligence in pursuing it."
>
> *Choctaw O. & G. R. Co.* v. *McDade,* 191 U. S. 64; 48 L. Ed. 96.
>
> *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 502.
>
> *Chesapeake & Ohio Ry. Co.* v. *DeAtley,* 241 U. S. 310.

The question of assumed risk was submitted to the jury as a question of fact and is fully covered by defendant's instructions (R. 219).

In the case of *Knapp* v. *Great Northern Ry. Co.*, 130 Minn. 405; 153 N. W. 848, the plaintiff was injured because of his placing his arm over an unguarded shaft which resulted in his coat sleeve being caught and his arm being drawn around the shaft and cut off. The court in that case used the following language:

> "Under the Federal Act *contributory negligence* does *not* defeat recovery, it merely serves to reduce the damages, while assumption of risk, under the facts of the case at bar, is a complete defense. For that reason *plaintiff's counsel desires everything which tends toward proving assumption of risk attributed to plaintiff's negligence, and defendant's counsel is equally eager to resolve all appearance of contributory negligence into an assumption of risk.*"

The court also held that the act of plaintiff in *inadvertently bringing his arm in contact* with an unguarded set screw on a revolving shaft was "referable to plaintiff's *negligence* rather than to assumption of known and appreciated danger arising out of defendant's negligence."

That case was affirmed by this court and is reported as *Great Northern R. Co.* v. *Knapp*, 240 U. S. 464; 60 L. Ed. 745.

The distinction between assumed risk and contributory negligence is clearly pointed out in the case of *Schlemmer* v. *Buffalo & C. Ry. Co.*, 220 U. S. 590, in which the court say (p. 596):

> "an employe is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known or are so plainly observable that the employe may be presumed to know of them, and if he continues

in the master's employ without objection, he takes upon himself the risk of injury from such defects.

"Contributory negligence on the other hand, is 'the *omission* of the employe *to use those precautions* for his own safety which ordinary prudence requires.'"

"The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. *The act more immediately leading to a specific accident is called negligent.* But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master * * * then, *unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name.*"

Schlemmer v. *Buffalo R. & P. R. Co.*, 205 U. S. 1; 51 L. Ed. 681; 27 Sup. Ct. 407.

Plaintiff did not assume the risk of the negligence of other of defendant's employees suddenly and unexpectedly arising.

Seaboard Air Line v. *Horton*, 233 U. S. 492.

Roberts on Federal Liability of Carriers, Vol. 1, Secs. 557, 558 (citing cases).

Gila Valley, etc., Ry. v. *Hall*, 232 U. S. 94; 58 Law Ed. 521.

Chesapeake & O. Ry. Co. v. *DeAtley*, 241 U. S. 310.

Choctaw O. & G. R. Co. v. *McDade*, 191 U. S. 64.

Roberts v. *C. C. C. & St. L. Ry. Co.*, 202 Ill. App. 480, 499-500.

Warren v. *Jackson*, 204 Ill. App. 576, 587.

Engel v. *C. B. & Q. R. R. Co.*, 111 Neb. 21; 195 N. W. 523.

Chicago Hair & Bristle Co. v. *Mueller*, 203 Ill. 558, 564.

If defendant's contention that it owed no duty to plaintiff because the custom to warn did not inure to his benefit and that the switching movement in question was performed in the usual and customary manner, then no negligence was proved and the question of assumed risk was not involved.

If the cars were switched "with a great deal more force than was requisite" and/or in violation of a custom which did inure to the benefit of plaintiff, thereby proximately causing or contributing to his injury, then the doctrine of assumed risk was either wholly inapplicable or at most required submission of the question to a jury for determination.

VII.

Weight to be given concurrent opinions of state trial and Appellate Courts.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of state trial and Appellate Courts upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Whitacre*, 242 U. S. 169.

To the same effect are:

Patton v. *Texas & Pac. Ry. Co.*, 179 U. S. 658; 45 L. Ed. 361; 21 S. C. 275.

Supreme Lodge K. of P. v. *Beck*, 181 U. S. 49; 45 L. Ed. 741; 21 Sup. Ct. 532.

VIII.

The cases cited by defendant are to be distinguished in that in none of them was there involved a violation of any custom or rule of the defendant, or any unusual movement creating an extraordinary danger or hazard.

A number of cases have been cited by defendant, among which are *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426, 430; *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Toledo & St. L. W. R. Co.* v. *Allen*, 48 Sup. Ct. 215, and *Chesapeake & O. R. Co.* v. *Nixon*, 271 U. S. 218, 70 L. Ed. 914, in support of its contention that defendant owed plaintiff no duty except not to wilfully or wantonly injure him.

In the *Aeby* case, 275 U. S. 426, 430, the plaintiff, who was a station agent, sustained injuries in falling upon an icy platform. The court held that the carrier's failure to remove snow and ice from the station platform did not violate any duty owed by the carrier to the station agent, since the latter's knowledge of the situation and of whatever danger existed by reason of the icy condition of the platform, was at least equal to that of the carrier; that the station agent assumed the risk of these known conditions and dangers and that the facts in evidence were insufficient to sustain a finding that the carrier was guilty of negligence.

The *Aerkfetz* case, 145 U. S. 418, was decided in May, 1892, prior to the enactment of the Federal Employers' Liability Act, which was passed in 1908. The facts in that case are not analogous to the facts in the instant case. Aerkfetz was a track worker engaged in repairing tracks. A switch engine "was constantly moving forwards and backwards in the yard where he worked." He knew that cars constantly used the tracks, but he "remained at work

without looking backward or watching for the moving train." He was at work in a place of danger and of necessity he was required to be constantly on the lookout. There was no rule or custom to give any signal or warning to persons situated as he was. The court held that the cars were not operated at a greater rate of speed "than that which was customary." The court further said that there was no duty, under the existing circumstances, to ring a bell or give a signal, because this would have been confusing. It was further held that Aerkfetz "had all the time knowledge of what was to be expected."

Plaintiff in the case at bar, had no knowledge nor reason to believe that the nine cars in question would be propelled against the cars standing on the team track "with a great deal more force than was requisite" and without notice or warning to the men who were engaged in unloading cars on this track.

In the *Allen* case, 48 Sup. Ct. 215, it was held that there was no showing "that the movement in question created an unusual hazard" and further that "in the absence of proof that he (plaintiff) was exposed to some unusual danger by reason of a departure from the practice generally followed" it could not be said that defendant was guilty of negligence. And again the court said that the men switching the cars "were not required to vary the switching practice customarily followed in that yard or to warn or take other steps to protect him."

In the case at bar, plaintiff's claim is that the defendant did not follow the customary practice, but on the contrary contended that because the customary practice was not followed, defendant was chargeable with negligence.

The *Nixon case*, 271 U. S. 218, is quite similar in principle to the *Allen* case. Nixon was riding along defendant's